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Supreme Court of the United States

OCTOBER TERM, 1940

No. 747

GEO. H. SHEPPARD, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL., *Petitioners*,

VS.

ORVILLE S. CARPENTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI



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Statement of the Case

This is a mandamus action brought by the respondent Orville S. Carpenter as an original proceeding in the Supreme Court of Texas against petitioners George H. Sheppard, Comptroller of Public Accounts of the State of Texas, and Charley Lockhart, Treasurer of the State of Texas, to compel them to issue respondent a warrant for his salary

for the month of September, 1940, as Chairman and Executive Director of the Texas Unemployment Compensation Commission, and to pay said warrant when issued. The office referred to is a civil State office. Respondent was also an officer in the National Guard of the United States and the State of Texas with the rank of Major, and, on September 19, 1940, he was ordered into the active military service of the United States in virtue of his being an officer in said National Guard.

The case involves respondent's right to hold his State office after he had been ordered into the active military service of the United States. Respondent by his pleadings expressly asserted that this right was secured to him by Sections 33 and 40 of Article XVI of the Constitution of the State of Texas (R., 4-5). On the other hand, it was claimed by petitioners in their pleadings that when respondent was ordered into the active military service of the United States he automatically vacated his State office; and in support of this claim petitioners invoked Section 12 of Article XVI of the State Constitution (R., 11).

Upon the issue thus joined the Supreme Court of Texas held that under the State Constitution, properly construed—the provisions of which were reviewed in detail by the Court—respondent had not vacated his State office and was entitled to payment of the salary attached thereto (R., 12-22).

The case is here on petition for certiorari, based on the claim that the State court's construction of the State Constitution brings its provisions into conflict with the Constitution of the United States and certain Federal statutes.

Summary of Argument

1. This Court has no jurisdiction because:

(a) Petitioners are without sufficient legal interest to present the Federal questions they are attempting to present.

(b) The denial of due process and equal protection claimed by petitioners to result from the State court's construction of the State Constitution affects, not petitioners, but only other persons who are not parties and are not represented by petitioners.

(c) The decision of the State court is based upon a non-federal ground adequate to support it.

(d) The Federal questions attempted to be raised are unsubstantial.

2. If the State court decided any Federal questions, they were correctly decided.

Argument

Point One

This Court Has no Jurisdiction of the Cause

(a) *Petitioners' lack of interest.*

Petitioners are disbursing officers of the State of Texas, whose ministerial duties are plainly defined in statutes mandatory in their application. It is their duty to pay the salaries of all State officers.

Called upon to pay respondent's salary for the month of September, 1940, as the holder of a State offiice, they declined to pay such salary for the entire month, assigning as a reason for their refusal the fact that he was an officer in the National Guard and had been ordered into active service on September 19, 1940, and had responded to such order and had thereby vacated his civil office.

Represented by the Attorney General of the State, petitioners invoked the judgment of the Supreme Court of the State in respect to their duty in the premises. That court, upon full consideration, held that, under certain provisions of the State Constitution (R., 18-22), it was the plain, ministerial duty of the petitioners to make such payment. The State court in its opinion said:

"The complete answer to the contentions made by the Attorney General is the plain and specific language used in Sections 33 and 40 of Article XVI of the Constitution, above copied herein. Those amendments reflect the will of the people of this State with reference to the members of the National Guard.

"* * * *

"By virtue of Sections 33 and 40 of Article XVI of the Constitution, we hold that Relator did not vacate his office as a member and Chairman and Executive Director of the Texas Unemployment Compensation Commission, when called into the military service of the United States and appointed an officer therein. We further hold that his appointment as Major in the United States Army does not violate Section 12 of Article XVI of the Constitution. Therefore he is entitled to be paid his salary."

Petitioners neither gained nor lost anything "by invoking the advice of the Supreme Court as to the proper action they should take." *(Smith v. Indiana,* 191 U. S. 138, 149.) They had only an official, as distinguished from a personal, interest in the questions they raised in the State court and are attempting to raise in this Court. In the circumstances, they are without standing to attack the constitutionality of the State Constitution, as construed by the State court, because of alleged conflict with the Fourteenth Amendment and certain Federal statutes, in order to support their refusal to perform the ministerial duties imposed on them by the State Constitution, as expounded by the State court and as enforced by its judgment. They will lose nothing by reason of performing these duties. *Smith v. Indiana, supra; Braxton County Court v. West Virginia,* 208 U. S. 192, 197; *Marshall v. Dye,* 231 U. S. 250, 258; *Stewart v. Kansas City,* 239 U. S. 14; *Lampasas v. Bell,* 180 U. S. 276. What the Court said in respect to the appellant in *Smith v. Indiana* is applicable to the petitioner here:

"We think the interest of an appellant in this Court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own State, should be content to abide by their decision."

Petitioners have come into this Court with nothing more than a "constitutional point of view"—and that not very plainly stated—whereas, to stay in this Court they must have a case in which they have

"a special, individualized stake."* This Court does not sit "to determine questions of law *in thesi*." *Marye v. Parsons*, 114 U. S. 325, 330.

Petitioners rely on *Coleman v. Miller*, 307 U. S. 433. There jurisdiction was affirmed by the majority because of the view that the Kansas senators who claimed that their votes had been improperly overridden and held for naught

"have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege."

Hawke v. Smith, 253 U. S. 221, and *Leser v. Garnett*, 258 U. S. 130, were thought by the majority to be controlling authorities. These cases affirm the legal interest of the voter in protecting the effectiveness of his vote. Their lack of pointed application here is obvious.

The majority opinion in *Coleman v. Miller, supra*, referred to the many cases holding that an officer who rests under legal duty to enforce a statute and whose enforcement of it is prevented by the holding of a State court that the statute violates the Constitution has sufficient legal interest to assail the decision—his interest growing out of his duty to enforce the statute. (307 U. S. 441-446.)

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*Per Mr. Justice Frankfurter, dissenting in Coleman v. Miller, 307 U. S. 433, 467.

Petitioners have not been prevented from performing their duties under the State law; they have not been prevented from enforcing the State law by the holding of a State court that the State law is in conflict with the Constitution of the United States. Instead, they are attempting to avoid the performance of their duties under the State law; they are attempting to prevent the enforcement of the State law as declared by the highest court of the State. Their duties are plainly defined in the State Constitution and at their special instance have been more concretely and definitely stated in the opinion and judgment of the State court. These duties are ministerial in nature and petitioners will lose nothing in performing them. In these circumstances the cases relied on by petitioners are clearly inapplicable. Petitioners have no standing to avoid the performance of their ministerial duties by attempting in this Court to bring about an asserted collision between the State Constitution, as construed by the State court, and the Fourteenth Amendment and certain Federal statutes. A decision by this Court of the questions petitioners are attempting to raise either the one way or the other will not affect petitioners. They are in this Court with a case that they cannot either gain or lose, for no decision the Court may render will confer on them any benefit or cause them any loss.

(b) *The "unjust discrimination" complained of does not affect petitioners.*

Petitioners claim that the State court's interpretation of Sections 33 and 40 of Article XVI of the

State Constitution, as amended in 1932, brings about "unjust discrimination" because it denies "to a large portion of the National Guard membership the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution." (Petition for Certiorari, p. 20.) This claim, thus vaguely stated, amounts to nothing because the victims of this "unjust discrimination" are not complaining. Petitioners do not belong to the class suffering this "unjust discrimination" or represent them and have no right to invoke the Fourteenth Amendment to protect them. *Columbus & Greenville Ry. Co. v. Miller*, 283 U. S. 96, 99; *Ludeling v. Chaffe*, 143 U. S. 301, 305; *Stewart v. Kansas City* 239 U. S. 14; *Marshall v. Dye*, 231 U. S. 250, 258.

(c) *The decision of the State court is based upon a non-federal ground adequate to support it.*

(1) The opinion of the State court expressly shows that its judgment was rested upon its construction of Sections 33 and 40 of Article XVI of the State Constitution, as amended in 1932. After quoting these two sections of the State Constitution (R., 18) the State court said:

"The complete answer to the contentions made by the Attorney General is the plain and specific language used in Sections 33 and 40 of Article 16 of the Constitution, above copied herein. Those amendments reflect the will of the people of the State with reference to the members of the National Guard. The clear policy of this State with respect to that matter is plainly expressed therein. The people have the right to change that policy if they desire.

That right does not rest either with the courts or with any other branch of the State Government. Courts should presume that the people intended to do precisely what they have done in adopting those amendments. This presumption should be indulged in willingly, and not grudgingly." (R., 21.)

Again, concluding its discussion of the question presented, the court said:

"By virtue of Sections 33 and 40 of Article 16 of the Constitution, we hold that Relator did not vacate his office as a member and Chairman and Executive Director of the Texas Unemployment Compensation Commission, when called into the military service of the United States and appointed an officer therein. We further hold that his appointment as Major in the United States Army does not violate Section 12 of Article 16 of the Constitution. Therefore he is entitled to be paid his salary." (R., 22.)

In its opinion on rehearing the State court said:

"The real question before us is: Does relator by being called into the active service of the National Guard of the United States vacate the civil office held by him in the State? We are not called upon to decide whether he vacates his commission in the National Guard of the United States. That is a question for the Federal authorities to decide, and not for us to determine." (R., 67.)

After referring to the case of *Lowe v. State*, 83 Tex. Cr. Rep. 134, and to the case of *Fekete v. City of East St. Louis*, 315 Ill. 58, decided before the State Constitution was amended, the State court further said:

"As pointed out in our original opinion, Sections 33 and 40 of Article 16 of the Constitution of Texas were adopted for the purpose of avoiding the holding in the Lowe case. The case of Thomas L. Fekete, Jr. v. City of East St. Louis, supra, was decided long prior to the adoption of Sections 33 and 40 of Article 16 of the Constitution, and the opinion in that case is not applicable to the case before us. It is not in any way in point, or even persuasive. The case of United States ex rel. v. Dern, Secretary of War, supra, involved the construction of an Act of Congress wherein, in substance, it was provided that under the War Department Appropriation Act of 1933 an officer in the National Guard, receiving a pension from the United States, cannot, without surrendering the pension, receive benefits extended by the Federal Government to members of the State Militia. See act March 4, 1933, sec. 1 (47 Stat. 1589); act June 15, 1933 (48 Stat. 153). Thus it will be seen that the question involved in that case was the right to draw both a pension and compensation under the Federal laws. The question involved here was not involved in that case, and the court did not have before it for construction the provisions of a state constitution similar to Sections 33 and 40 of Article 16 of our Constitution." (R., 67-68.)

(2) Apparently petitioners contend that the State court's construction of the State Constitution puts its provisions in conflict with Section 576, Title 10, U.S.C.A. (Petitioners' Brief, pp. 49-50.) The court's opinion on rehearing shows that its judgment was not based to any extent upon a construction of that statute, although it did point out that, under the terms of that statute, the office vacated is the office in the Army and not the civil office. (R., 67.)

It has been held that this statute applies only to officers of the Regular Army. (Vol. 22, Opinions of the Attorney General, page 88.)

(3) The further claim that the opinion of the State court conflicts in some way not clearly stated with other Federal statutes relating to the National Guard is so plainly untenable that it requires no discussion.

(d) *The Federal questions are without substance.*

The Federal questions attempted to be raised are:

(1) Failure to give proper effect to Section 576, Title 10, U.S.C.A. That section applies only to officers in the Regular Army and, for that and other obvious reasons, has no application here.

(2) The "unjust discrimination" claimed to have resulted from the State court's construction of the State statute. Petitioners have no standing to complain of this discrimination because it does not affect them. Furthermore, the claim that this alleged discrimination violates the Fourteenth Amendment is plainly without merit.

Point Two

If the State court decided any Federal questions, they were correctly decided.

Respondent relied on Sections 33 and 40 of Article XVI of the State Constitution in support of his right to hold his State office and draw his salary

after he had been called into the active military service of the United States (R., 4-6.) On the other hand, petitioners in support of their claim that respondent had vacated his State office relied on Section 12 of Article XVI of the State Constitution (R., 11). The State court, construing the State Constitution, has held that Sections 33 and 40 of Article XVI have controlling effect (R., 18-22).

The State court's construction of the State Constitution is, of course, final, leaving only the question of whether the State Constitution, thus construed, conflicts with the National Constitution or some valid Federal statute.

We have already referred to the claim of unjust discrimination violating the Equal Protection Clause (ante, p. 7). If discrimination exists, it is a sufficient answer that the petitioners are in no way affected by it. Furthermore, petitioners have failed to point out any unreasonable or arbitrary discrimination resulting from the State court's construction of the State Constitution. The discrimination they find is no more than reasonable discrimination by the makers of the State Constitution in defining eligibility to hold a State office.

The claim that the State court's construction of the State Constitution brings it in conflict with Section 576, Title 10, U.S.C.A., is only mildly pressed and is clearly untenable. No effort is made to demonstrate the existence of the conflict and it is plain that the conflict does not exist. The Federal statute referred to applies only to officers in the Regular Army. It defines a test of eligibility to hold a Federal office, whereas the State Constitution, as

construed by the State court, defines a test of eligibility to hold a State office. The two cannot be in conflict.

Petitioners, executive officers of the State whose duties are ministerial in character, have no standing to assail the validity of the State Constitution under which they hold their offices, as construed by the State court; and they have wholly failed to show that the State Constitution, thus construed, is invalid because of conflict with the Federal Constitution or any Federal statute.

Respectfully submitted,

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